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December 3, 2015

REPORT TO THE CHARTER REVIEW COMMITTEE

SAN DIEGO CITY EMPLOYEES' RETIREMENT SYSTEM

INTRODUCTION

This Report is prepared at the request of the Charter Review Committee (Committee). On August 6, 2015, the Committee requested that this Office provide legal analysis related to certain proposals to amend section 144 of the San Diego City Charter (Charter), submitted by the staff of the San Diego City Employees' Retirement System (SDCERS). A copy of the proposal is attached to this Report as Attachment A.

DISCUSSION

I. PROPOSAL TO AMEND CHARTER SECTION 144 RELATED TO POWERS AND DUTIES OF THE SDCERS BOARD OF ADMINISTRATION (BOARD).

SDCERS has recommended that the last paragraph of Charter section 144 be amended to add language and strike language, as follows:

The Board of Administration shall be the sole authority and judge under such general ordinances as may be adopted by the Council as to the conditions under which persons may be admitted to benefits of any sort under the retirement system; shall have all powers and duties provided in the Declaration of Group Trust for the SDCERS Group Trust effective July 1, 2007 and any amendments thereto or successor trusts hereinafter adopted by Resolution of the City Council; and shall have exclusive control of the administration and investment of such fund or funds as may be established; ~~and shall be permitted to invest in any bonds or securities which are authorized by General Law for savings banks; and, further, shall be permitted to invest in such additional classes or types of investments as deemed prudent by the Board consistent with its fiduciary duties. are approved by resolution of the Council of the City of San Diego; provided, however, that individual investments within the classes or types approved by the Council must be approved by independent investment counsel; and provided, further, the board may place such funds in the hands of the Funds Commission for investment. Provided, however, that the~~

~~Auditor and Comptroller shall refuse to allow any warrant drawn for payment of a retirement allowance if, in the opinion of the Auditor and Comptroller, such retirement allowance has been granted in contravention of this Article or any ordinances passed under the authority granted herein.~~

The Committee asked this Office to provide legal analysis regarding the implications of this proposed Charter amendment.

A. Proposal to Give the Board All Powers and Duties Provided in the Declaration of Trust for the SDCERS Group Trust Effective July 1, 2007, and Naming Specific Trusts in the Charter.

This proposal involves adding language to the Charter, stating that the Board has “all powers and duties provided in the Declaration of Group Trust for the SDCERS Group Trust effective July 1, 2007 and any amendments thereto or successor trusts hereinafter adopted by Resolution of the City Council.”

SDCERS staff has informed this Office that this language is necessary to ensure that the Charter and the Group Trust are consistent. However, this Office disagrees that this language is necessary, and advises *against* adding this language to the Charter.

The Declaration of Trust for the SDCERS Group Trust (Group Trust) was not approved by the San Diego City Council (Council). It was approved by the Board on March 16, 2007. *See* San Diego Resolution R-303037 (Oct. 12, 2007) (staff supporting materials). A copy of the Group Trust is attached to this Report as Attachment B.

In addition to administering the City’s retirement plan, SDCERS administers the retirement plans for the San Diego Unified Port District (Port) and the San Diego County Regional Airport Authority (Airport Authority).¹ The stated purpose of the Group Trust is “to hold and jointly invest the assets of the Participating Trusts, and make appropriate payments pursuant to directions from the Participating Trusts.” Attachment B, art. II, § 2.2. Although the Group Trust was not presented to the Council for approval, the Council approved Participation and Administration Agreements between SDCERS and the Port, SDCERS and the Airport Authority, and SDCERS and the City, on September 25, 2007. San Diego Resolution R-303037.

The Group Trust was prepared for the Board and solely approved by the Board. It names the Board as the Trustee, and describes the powers and duties of the Trustee. Attachment A, art. I, § 1.18; art. III, § 3.2. The powers, as described in the document, are broad, and include the authority to sell property, participate in reorganizations or mergers, borrow money, and settle or compromise claims or debts, among others. *Id.* It is beyond the scope of this Report to analyze whether the powers and duties of the Board, as set forth in the Group Trust, are consistent with applicable law. However, we note that the Board’s powers as set forth in the Group Trust are broad.

¹ Charter section 149 authorizes the participation of other public agencies in the City’s retirement trust fund, as long as the Council approves it. A contracting public agency and its employees are “responsible for all costs associated with participation in the [City Employees Retirement Trust] Fund and the administration of the public agency’s benefits.” San Diego Charter § 149.

The Charter, at section 143, provides that the Board has “plenary authority and fiduciary responsibility for investment of moneys and administration of the system as provided for in article XVI, section 17 of the California Constitution.” San Diego Charter § 143. The powers and duties, as set forth in the California Constitution, will control over any conflicting provisions in the Charter.

On November 3, 1992, California voters approved Proposition 162, an initiative measure, known as “The California Pension Protection Act of 1992,” which added language to article XVI, section 17 (Proposition 162).²

² The relevant language of article XVI, section 17 of the California Constitution is as follows:

Notwithstanding any other provisions of law or this Constitution to the contrary, the retirement board of a public pension or retirement system shall have plenary authority and fiduciary responsibility for investment of moneys and administration of the system, subject to all of the following:

(a) The retirement board of a public pension or retirement system shall have the sole and exclusive fiduciary responsibility over the assets of the public pension or retirement system. The retirement board shall also have sole and exclusive responsibility to administer the system in a manner that will assure prompt delivery of benefits and related services to the participants and their beneficiaries. The assets of a public pension or retirement system are trust funds and shall be held for the exclusive purposes of providing benefits to participants in the pension or retirement system and their beneficiaries and defraying reasonable expenses of administering the system.

(b) The members of the retirement board of a public pension or retirement system shall discharge their duties with respect to the system solely in the interest of, and for the exclusive purposes of providing benefits to, participants and their beneficiaries, minimizing employer contributions thereto, and defraying reasonable expenses of administering the system. A retirement board’s duty to its participants and their beneficiaries shall take precedence over any other duty.

(c) The members of the retirement board of a public pension or retirement system shall discharge their duties with respect to the system with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise of a like character and with like aims.

(d) The members of the retirement board of a public pension or retirement system shall diversify the investments of the system so as to minimize the risk of loss and to maximize the rate of return, unless under the circumstances it is clearly not prudent to do so.

(e) The retirement board of a public pension or retirement system, consistent with the exclusive fiduciary responsibilities vested in it, shall have the sole and exclusive power to provide for actuarial services in order to assure the competency of the assets of the public pension or retirement system.

(f) With regard to the retirement board of a public pension or retirement system which includes in its composition elected employee members, the number, terms, and method of selection or removal of members of the retirement board which were required by law or otherwise in effect on July 1, 1991, shall not be changed, amended, or modified by the Legislature unless the change, amendment, or modification enacted by the Legislature is ratified by a majority vote of the electors of the jurisdiction in which the participants of the system are or were, prior to retirement, employed.

(g) The Legislature may by statute continue to prohibit certain investments by a retirement board where it is in the public interest to do so, and provided that the prohibition satisfies the standards of fiduciary care and loyalty required of a retirement board pursuant to this section.

(h) As used in this section, the term “retirement board” shall mean the board of administration, board of trustees, board of directors, or other governing body or board of a public employees’ pension or retirement system; provided, however, that the term “retirement board” shall not be interpreted to mean or include a governing body or board created after July 1, 1991 which does not administer pension or retirement benefits, or the elected legislative body of a jurisdiction which employs participants in a public employees’ pension or retirement system.

The stated purpose and intent of Proposition 162 was to, in part,

[E]nsure that the assets of public pension systems are used exclusively for the purpose of efficiently and promptly providing benefits and services to participants of these systems, and not for other purposes [and] [t]o give the sole and exclusive power over the management and investment of public pension funds to the retirement boards elected or appointed for that purpose, . . . and to prohibit the . . . executive or legislative body of any political subdivision of this state from tampering with public pension funds.

Proposition 162, Section three (d) and (e).³

Thus, the California Constitution establishes the nature and scope of the Board's plenary authority and fiduciary duties. The Board has "the sole and exclusive fiduciary responsibility over the assets of the . . . [City's] retirement system" and the "sole and exclusive responsibility to administer the system in a manner that will assure prompt delivery of benefits and related services to the participants and their beneficiaries." Cal. Const., art. XVI, § 17(a). The California Constitution also states: "The assets of a public pension or retirement system are trust funds and shall be held for the exclusive purposes of providing benefits to participants in the pension or retirement system and their beneficiaries and defraying reasonable expenses of administering the system." *Id.*

It is this Office's opinion that the Charter, as presently written, is clear, and expressly incorporates the California constitutional provisions. No further language is needed to describe the powers and duties of the Board; additional provisions may, in fact, conflict or confuse the well-established authority and duties. If the SDCERS staff believes that all of the powers and duties as set forth in the Group Trust should also be set forth in the Charter, then there should be a full discussion at the Council, prior to placement of this language on the ballot.

B. Proposal to Give the Board the Sole Authority to Invest in Classes or Types of Investments it Deems Prudent Beyond Those Investment Options Already Established or Authorized by General Law.

This proposal adds language to authorize the Board to invest in any classes or types of investments "deemed prudent by the Board consistent with its fiduciary duties." It also seeks to repeal provisions that require certain types of investments to be approved by Council resolution and by independent investment counsel and that authorize the Board to place funds "in the hands of the Funds Commission for investment."

SDCERS states that this language is necessary "to achieve consistency with the Board's fiduciary duties as well as consistency between provisions in other Articles of the Charter." See July 13, 2015 Letter from Mark Hovey to Steven Hadley, Attachment A.

³ Proposition 162 is available at 1991 Cal. Legis. Serv. Prop. 162 (West), and http://repository.uchastings.edu/cgi/viewcontent.cgi?article=2076&context=ca_ballot_props

It is this Office's view that the proposed modifications are not necessary because the Charter must be read in conjunction with the language added to the California Constitution by Proposition 162. To the extent that the Charter, as presently written, conflicts with the California Constitution, the Constitution will control. The Board has "sole and exclusive fiduciary responsibility over the assets of the public pension or retirement system." Cal. Const., art. XVI, § 17(a). The word "plenary" has been interpreted "to mean that retirement boards would have the sole and complete power to invest their funds and to administer their systems, as opposed to being subject to direction from state and local legislative and executive bodies in these matters." *Singh v. Board of Ret.*, 41 Cal. App. 4th 1180, 1192 (1996). This authority is intended to "insulate the administration of retirement systems from oversight and control by legislative and executive authorities." *Id.*

The Board must "diversify the investments of the system so as to minimize the risk of loss and to maximize the rate of return." Cal. Const. art. XVI, § 17(d). The Board also has "sole and exclusive power to provide for actuarial services in order to assure the competency of the assets of the public pension or retirement system." *Id.* at § 17(e). Proposition 162 granted the Board authority to administer the retirement system funds without interference. *Westly v. California Pub. Emps.' Ret. Sys.*, 105 Cal. App. 4th 1095, 1110 (2003).

However, the constitutional powers are not unlimited. *City of San Diego v. San Diego City Emps.' Ret. Sys.*, 186 Cal. App. 4th 69, 79 (2010). The Charter, as presently written, requires the Board to seek approval of investments by independent investment counsel. SDCERS staff is recommending deletion of this language, and has not provided a rationale for this proposed change.

The SDCERS proposal also seeks to repeal the following limitation on the Board's authority: "Provided, however, that the Auditor and Comptroller shall refuse to allow any warrant drawn for payment of a retirement allowance if, in the opinion of the Auditor and Comptroller, such retirement allowance has been granted in contravention of this Article or any ordinances passed under the authority granted herein." The responsibilities of the Auditor and Comptroller are assumed by the City's Chief Financial Officer under the strong mayor form of government. San Diego Charter § 39. This language has existed in the Charter since it was originally approved by City voters on April 7, 1931. SDCERS staff has not provided sufficient justification for repeal of this language.

Rather, the language, as presently set forth in the Charter, provides a check on the Board's authority, and must be read in a way that is consistent with the California Constitution. In *Westly*, the Board of Administration for the California Public Employees' Retirement System (CalPERS) attempted to circumvent the authority of the Office of State Controller to audit and determine the legality of claims regarding pay. 105 Cal. App. 4th at 1105. The court analyzed article XVI, section 17 of the California Constitution and concluded that the plenary authority of the CalPERS Board "is limited to actuarial services and to the protection and delivery of the assets, benefits, and services for which the Board has a fiduciary responsibility." *Id.* at 1110. "That authority did not extend to matters within the purview of other branches of government and did not encompass areas not expressly dedicated to the board." *City of San Diego*, 186 Cal.

App. 4th at 79. Plenary power under article XVI, section 17 of the California Constitution “does not mean unreviewable power.” *Id.* (citing and quoting *Board of Ret. v. Santa Barbara Cnty. Grand Jury*, 58 Cal. App. 4th 1185, 1193 (1997)). As the court of appeal recently explained, SDCERS has “exclusive authority to administer plan assets,” but it does not have “plenary authority to evade the law.” *Id.* at 78.

This Office has previously advised that Proposition 162 did not change the responsibilities of the Auditor and Comptroller, now assumed by the Chief Financial Officer, to verify the accuracy of claims made on the City’s Retirement Fund. 1998 City Att’y MOL 348 (98-21; Aug. 28, 1998). Further, this Office has also advised that SDCERS may operate its own ledger system, but only within certain parameters, and only if the City retains its ability to audit the system and control payments as required by Charter section 144. 2009 City Att’y MOL 30 (2009-3; Apr. 24, 2009). SDCERS is recommending deletion of the language that authorizes this ability to audit the system. This is a substantive change, and requires policy considerations of its consequences before it is placed on the ballot.

II. PROPOSAL TO AMEND CHARTER SECTION 144 TO CLARIFY WHETHER PORT AND AIRPORT AUTHORITY MEMBERS CAN SERVE IN BOARD SEATS.

SDCERS staff has proposed the following additional amendment to Charter section 144:

Prior to April 1, 2005, in anticipation of the effective date, and thereafter, members shall be selected to serve as follows:

(b) One (1) police safety member of the Retirement System elected for the active police safety members to serve a four (4) year term, except that the inaugural member elected in 2005 to fill the seat in this capacity shall serve a two (2) year term. For purposes of this section, police safety members eligible to serve and vote shall include any police safety members employed by a Contracting Public Agency as defined in Section 149 of this Article.

(c) One (1) fire safety member of the Retirement System elected by the active fire safety members to serve a four (4) year term. For purposes of this section, fire safety member eligible to serve and vote shall include any fire safety members employed by a Contracting Public Agency as defined in Section 149 of this Article.

(d) Two (2) general members of the Retirement System elected by active general members of the Retirement System to serve a four (4) year term. For purposes of this section, general members eligible to serve and vote shall include any general members employed by a Contracting Public Agency as defined in Section 149 of this Article.

(e) One (1) retired member of the Retirement System elected by the retired members of the Retirement System to serve a four (4) year term, except that the inaugural member elected in 2005 to fill the seat in this capacity shall serve a two (2) year term. For purposes of this section, retired members eligible to serve and vote shall include any retired members of a Contracting Public Agency as defined in Section 149 of this Article.

The Committee has asked this Office whether this proposed language is necessary to ensure that Port and Airport Authority members are eligible to serve on the Board. SDCERS staff has stated that this language is necessary to ensure that members, as defined in section 144, includes employees of the Port and Airport Authority.

This Office has been informed by SDCERS staff that employees from the Port and the Airport Authority have not previously served on the Board. This Office has previously advised that "members" as used in Charter section 144 means members of the retirement system from this City. 1994 City Att'y MOL 347 (94-41; Apr. 27, 1994). This City's retirement plan is separate and distinct from the retirement plans for the Port and the Airport Authority. To make it clear that Port and Airport Authority members may serve on the Board, the SDCERS staff recommendation would be required. However, because members from the Port and Airport Authority have not previously served on the Board, this is a substantive, policy change, and the Council should consider the policy issues before this proposal is placed on a ballot.

This Office is available to provide any further guidance on these issues, as requested by the Committee.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Joan F. Dawson
Joan F. Dawson
Deputy City Attorney

JFD:ccm
RC-2015-10
Doc. No. 1178648
Attachments

ATTACHMENT A



Mark A. Hovey
Chief Executive Officer

July 13, 2015

Mr. Steven Hadley
Charter Review Committee Consultant
for Council President Sherri Lightner
City Administration Building
202 C Street
San Diego, CA 92101

Dear Mr. Hadley:

On January 30, 2015, I provided the enclosed letter to Scott Chadwick providing SDCERS' suggestions for revisions to City Charter Article IX. The Charter Review Committee graciously allowed the SDCERS Board of Administration ("SDCERS Board") additional time to review and provide additional suggestions. The SDCERS Board has now completed its review.

SDCERS has received requests from both the San Diego Unified Port District ("UPD") and the San Diego County Regional Airport Authority ("Airport") to provide Charter language allowing UPD and Airport employees the opportunity to run for the elected seats on the SDCERS Board. The SDCERS Board concurs with this request.

Enclosed are SDCERS' proposed updates and modifications to Article IX of the City Charter. In addition to the suggestions made in my January 30, 2015 letter, the SDCERS Board has requested the following revisions:

- Amend Charter Section 141 to provide that nothing contained in Section 141 or Section 143 of the Charter will preclude the City of San Diego from agreeing to pay to SDCERS any portion of an overpayment or underpayment, and associated interest assessed by the Board, where the overpayment or underpayment was proximately caused by the fault or negligence of a City employee acting in the course and scope of his or her employment. The Council would be empowered to enact any and all ordinances necessary to put this provision into effect. Any ordinances enacted pursuant to this amendment would not be subject to a Charter Section 143.1 vote of the membership or the electorate.
- Amend Charter Section 144 to include in the eligibility requirements for appointment to the Board 15 years of legal experience related to the practice of law in any of the fields listed (i.e., pension administration, pension actuarial practice, investment management, real estate, banking or accounting).

- Amend Charter Section 144 to allow general, safety and retired members of Contracting Public Agencies to run for election and vote in elections for the elected positions on the SDCERS Board of Administration.

SDCERS is suggesting that the Charter be amended to allow the City to enact an ordinance, at its discretion, allowing the City to pay SDCERS for any portion of an overpayment of benefits to or underpayment of contributions from members and associated interest where the overpayment or underpayment was caused by the fault or negligence of a City employee. SDCERS' employees are City employees.

SDCERS works directly with its members to resolve any active member underpayments to the pension system, or retired member benefit overpayments (both collectively referred to as "overpayments"). Due to IRS requirements, SDCERS also collects interest from the members on the overpayment, at a rate equal to the SDCERS assumed rate of return (currently 7.25%). The SDCERS Board of Administration would like for the City to consider playing a role in resolving such underpayments/overpayments.

To provide perspective on this issue, SDCERS works diligently to make zero mistakes, and while we successfully and accurately process hundreds of thousands of transactions each year, our staff members are not perfect. When the mistakes have been made, the error is usually the results of a step or process not done correctly by an SDCERS staff member, rather than due to an error made by the member, or the City.

IRS rules require that in the event of an overpayment, SDCERS resolve the overpayment by collecting the full principal amount, with interest at the plan's earnings rate, to make the system "whole." Consistent tax advice from SDCERS outside counsel advises that we have been following the IRS corrections process accurately since SDCERS received its IRS Determination Letter of plan compliance back in 2008.

Members frequently comment to SDCERS that if the mistake was not due to their (i.e., the member's) error, why are they doubly "penalized" by assessing interest on the amount. Indeed, SDCERS implemented a policy in 2008 to comply with IRS overpayment requirements and decided to charge the member a lower interest rate . . . 2% . . . and have the balance of the interest due be covered by the City. Following correspondence between SDCERS and the City Attorney's office, who clearly conveyed that the City and taxpayers could not be held responsible for resolving overpayments to the member, SDCERS revised its policy in 2009 to recover the entire interest amount from the member and has consistently done so since then.

It has been suggested SDCERS procure insurance to cover such errors, rather than have the member repay the error in full. However, insurers have stated deductibles would be involved that exceed the cost of the overpayment, and even if the overpayments were to exceed the deductible, the insurance company retains subrogation rates to pursue a counter claim against the City. In short, insurance might transfer a portion of the burden off the member, but that burden would be placed back on the City, regardless.

It has also been suggested SDCERS simply fix the overpayment issue prospectively, and historical overpayment amounts be left in the City's Unfunded Actuarial Liability (UAL).

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Mr. Steven Hadley
July 13, 2015

Unfortunately, the IRS explicitly does not allow the plan sponsor to cover overpayments via an amortized UAL phased into the City's annual pension payments. Instead, the City, per IRS rules, must immediately cover any portion of the overpayment not made by the member.

As noted above, the SDCERS Board believes the IRS effectively ties its hands and that full recoupment of the overpayment, with interest, is required from the member. However, the Board also believes that given the underlying cause of the error has traditionally been made by SDCERS, an agent of the City in this case, that it may be prudent for the City to acknowledge the impossibly high standard of perfection placed on its employees and agree to shoulder a portion of the overpayment.

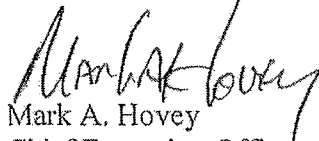
It's difficult to assess the amount of money involved in prospective overpayment corrections to be done by SDCERS (i.e., it is not possible to predict future overpayment errors). However, SDCERS does report annually on the number and amount of overpayments collected from members. In FY 2013, that amount was \$701,171, which included \$611,501 associated with the PSC Litigation lawsuit the City won against SDCERS. In FY 2014, SDCERS collected \$150,788 in member overpayments. There are approximately 300 potential member overpayment issues that SDCERS is researching now, and we expect to resolve those by December 31, 2015; this relatively large number of open matters was primarily driven by the complete data conversion audit when SDCERS covered to its new pension system in May 2014. Going forward, we expect overpayments to be limited in number and not material.

As previously advised, SDCERS believes the majority of the remaining proposed Charter modifications are required to achieve consistency with the Board's fiduciary duties as well as consistency between provisions in other Articles of the Charter. SDCERS is also proposing that the City amend the Charter to allow Police Recruits to join SDCERS upon entering the Police Academy. Not only does SDCERS believe that this was the actual intent of the proposers of Proposition B, but that it will also assist the City in its retention of new police officers.

The SDCERS Board of Administration respectfully requests the City review applicable City Charter language to allow for flexibility in resolving member overpayments with the City.

SDCERS would be happy to appear before the Charter Review Committee if requested. Thank you for your consideration.

Sincerely,



Mark A. Hovey
Chief Executive Officer

MAH/er

Enclosure: SDCERS' Proposed Revisions to the City Charter

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Mr. Steven Hadley

July 13, 2015

cc: SDCERS Board of Administration
Elaine Reagan, SDCERS Deputy CEO – Compliance & Legal Operations
Hon. Council President Sherri S. Lightner
Hon. Mayor Kevin Faulconer
Scott Chadwick, Chief Operating Officer
Hon. Jan Goldsmith, City Attorney
Paul Cooper, Asst. City Attorney
Sharon Spivak, Deputy City Attorney
Roxanne Story Parks, Deputy City Attorney



2015 CITY CHARTER REVIEW SDCERS' PROPOSED REVISIONS TO THE CITY CHARTER CITY CHARTER ARTICLE IX

Section 140: Establishment of Separate Retirement Pension Systems; Definitions

As of the election at which this Section becomes operative, the electorate of the City of San Diego has found and declared that the fiscal best interests of the City are served by reforming the retirement system authorized by this Charter to be established for City employees.

"Defined Benefit Pension Plan" or "Defined Benefit Pension System" is a system or plan to provide a specified allowance to a city retiree or a retiree's spouse after retirement that is based on a set formula based on factors such as age, years of service, and elements of compensation as established in this Article.

The Defined Benefit Pension Plan in place prior to said election, established by the City Council pursuant to Sections 141 through 149 of this Charter, may remain in place until, for any reason, there remain no participants in the Defined Benefit Plan. The City Council may by ordinance utilize any lawful means for terminating the Defined Benefit Plan. Any closure of the Defined Benefit Plan shall be designed and implemented to protect the employees' vested rights in the Defined Benefit Plan, generate cost savings for taxpayers, and ensure compliance with applicable laws and regulations, including tax regulations.

At such time as there remain no participants in the Defined Benefit Pension Plan, the City shall take such actions as are necessary and appropriate to promptly wind down and terminate the Defined Benefit Pension Plan.

Notwithstanding the foregoing, and except as expressly provided in this Article IX, all Officers and employees, with the exception of sworn police officers and police recruits participating in the City's Police Academy, who are initially hired or assume office on or after the effective date of this Section shall participate only in such Defined Contribution Plans as authorized by Sections 150 and 151 of this Charter.

The provisions of Sections 141 through 149 shall apply only to the Defined Benefit Plan, and those City employees eligible to participate in the Defined Benefit Plan. The provisions of Sections 150 and 151 shall apply only to the Defined Contribution Plan, and those City employees eligible to participate in the Defined Contribution Plan, except as expressly stated. Notwithstanding the foregoing, and except as provided in this Article IX, the City Council is hereby authorized and empowered by ordinance to enroll sworn police officers hired after the effective date of this section in either the Defined Benefit Plan or the Defined Contribution Plan. This section shall be implemented in a manner consistent with the requirements of applicable labor relations laws.

(Addition voted 06-05-2012; effective 07-20-2012.)

+Section 141: City Employees' Retirement System

The Council of the City is hereby authorized and empowered by ordinance to establish a retirement system and to provide for death benefits for compensated public officers and employees, other than those policemen and firemen who were members of a pension system on June 30, 1946. No employee shall be retired before reaching the age of sixty-two years and before completing ten years of service for which payment has been made, except such employees may be given the option to retire at the age of fifty-five years after twenty years of service for which payment has been made with a proportionately reduced allowance. Policemen, firemen and full time lifeguards, however, who have had ten years of service for which payment has been made may be retired at the age of fifty-five years, except such policemen, firemen and full time lifeguards may be given the option to retire at the age of fifty years after twenty years of service for which payment has been made with a proportionately reduced allowance.

The Council may also in said ordinance provide:

- (a) For the retirement with benefits of an employee who has become physically or mentally disabled by reason of bodily injuries received in or by reason of sickness caused by the discharge of duty or as a result thereof to such an extent as to render necessary retirement from active service.
- (b) Death benefits for dependents of employees who are killed in the line of duty or who die as a result of injuries suffered in the performance of duty.
- (c) Retirement with benefits of an employee who, after ten years of service for which payment has been made, has become disabled to the extent of not being capable of performing assigned duties, or who is separated from City service without fault or delinquency.
- (d) For health insurance benefits for retired employees.

Notwithstanding anything to the contrary in this section, the Charter or the Municipal Code, reciprocal service granted under the Uniform Reciprocal Provisions pursuant to the Reciprocity Contract between SDCERS and CalPERS shall be included as service for purposes of establishing eligibility for retirement benefits.

1 (Editor's note: Supplement No. 655)

(Amendment voted 03-13-1945; effective 04-09-1945.)

(Amendment voted 04-19-1949; effective 05-20-1949.)

(Amendment voted 03-13-1951; effective 03-26-1951.)

(Amendment voted 06-08-1954; effective 01-10-1955.)

(Amendment voted 11-06-1990; effective 02-19-1991.)

(Amendment voted 11-08-1994; effective 01-30-1995.)

(Amendment voted 11-05-1996; effective 02-10-1997.)

Section 141.1: Reform of ~~Sworn~~ Police Officer Defined Benefit Pension Plan

Notwithstanding any other provision of this Charter, or any ordinance or other action taken pursuant hereto, the maximum amount of retirement benefit payable to a sworn police officer or police recruit participating in the City's Police Academy, who is hired after the effective date of this section and who is a participant under the Defined Benefit Pension Plan, shall be an amount equivalent to 80% at age 55 of the average of the participant's highest consecutive 36 months of Base Compensation as defined by Section 70.1. The maximum set by this provision shall decrease by 3% (three percentage points) for each year that such participant retires before age 55.

(Addition voted 06-05-2012; effective 07-20-2012.)

Section 141.2: Full and Fair Employee Contributions for The Defined Benefit Pension Plan

For officers and employees who have the legal right to remain in the established Defined Benefit Pension Plan, the City shall contribute annually an amount substantially equal to that required of the employee for a normal retirement allowance, as certified by the Actuary established in Charter Section 142, but shall not contribute in excess of that amount, except in the case of financial liabilities accruing under any new retirement plan or revised retirement plan because of past service of the employee. The City shall not pay, cap the employee contribution rate, or otherwise compensate for any portion of a contribution to the Retirement System by a City Officer or employee.

To the fullest extent permissible by law, in calculating annual contributions for the City and City employees, the Retirement Board shall divide equally between those two parties all costs those costs explicitly and exclusively reserved to the City in this Section and Section 143. Contributions shall also be governed by Section 143 of this Article. In the event of a conflict between this Section and Section 143, this Section shall prevail. This section is not intended to interfere with vested defined rights of any retiree receiving benefits from the Defined Benefit Retirement System or of any employee enrolled in the Defined Benefit Retirement System as of the effective date of this section.

Nothing contained in this Section shall preclude the City from entering into a settlement of *City of San Diego v. San Diego City Employees' Retirement System* Case No. #37-2010-00091207-CU-WM-CTL to define responsibilities of the City and employees for unfunded liabilities of the Retirement System even if the settlement includes terms that might otherwise conflict with the above restrictions, as long as the settlement is approved by the court as a good faith settlement and approved by a two-thirds vote of the City Council.

Nothing contained in this Section or in Section 143 shall preclude the City from agreeing to pay to the Retirement System any portion of an overpayment of benefits or underpayment of contributions, and any interest associated with an overpayment or underpayment as assessed by the Board of Administration, where the overpayment or underpayment was proximately caused by the fault or negligence of a City employee acting in the course and scope of his or her employment. The Council of the City is hereby authorized and fully empowered to enact any and all ordinances necessary to carry into effect the provisions of this section and any and all ordinances so enacted shall have equal force and effect with this Article and shall be construed to be a part hereof as fully as if drawn herein. Any ordinance enacted pursuant to this section shall not be considered an ordinance affecting or enhancing the benefits of any active or retired Member of the System and shall not be subject to the voting requirements set forth in Section 143.1.

(Addition voted 06-05-2012; effective 07-20-2012.)

Section 142.1: Employment of Attorneys (New)

The Board of Administration hereinafter provided, may appoint attorneys to advise and represent the Board, as may be necessary. Attorneys hired or retained by the Board shall have duties and responsibilities only to the Retirement System and its Board of Administration and shall not have a duty of loyalty or care to the City of San Diego. Except to the extent that the

Board retains outside counsel as consultants, such appointments shall be made under the provisions of Article VIII of this Charter.

Section 143: Contributions [No Change.]

Section 143.1: Approval of Retirement System Benefit [No Change]

Section 144: Board of Administration

Effective April 1, 2005, the system shall be managed by a newly constituted Board of Administration which shall consist of 13 members. Seven members shall constitute a quorum of the Board and the concurring vote of seven members shall be required for the Board to take any action. Prior to April 1, 2005, in anticipation of the effective date, and thereafter, members shall be selected to serve as follows:

(a) Seven (7) members shall be appointed by the Mayor and confirmed by the Council. No person who is a City employee, participant in the Retirement System, or City union representative may be eligible for appointment in this category. Such appointees shall have the professional qualifications of a college degree in finance, economics, law, business, or other relevant field of study or a relevant professional certification. In addition, such appointees shall have a minimum of fifteen (15) years' combined experience in pension administration, pension actuarial practice, investment management, real estate, banking, or accounting or the practice of law related to any of the preceding fields. Members of the Board serving in this category shall serve staggered terms of four (4) years each. Inaugural appointments occurring after the effective date of this section shall have four (4) members serving two (2) year terms and three (3) members serving three (3) year terms. The Board shall determine which open seats shall serve four (4) and three (3) years terms to achieve staggered terms of four (4) years for all subsequent appointments. ~~(inaugural appointments shall have three (3) members serving two year terms) and m~~Members in this category shall be limited to a maximum of eight (8) consecutive years in office and an interval of four (4) years must pass before such persons can be reappointed. Such appointees shall not have any other personal interests which would create a conflict of interest with the duties of a Board member and trustee.

(b) One (1) police safety member of the Retirement System elected by the active police safety members to serve a four (4) year term, except that the inaugural member elected in 2005 to fill the seat in this category shall serve a two (2) year term. For purposes of this section, police safety members eligible to serve and vote shall include any police safety members employed by a Contracting Public Agency as defined in Section 149 of this Article.

(c) One (1) fire safety member of the Retirement System elected by the active fire safety members to serve a four (4) year term. For purposes of this section, fire safety member eligible to serve and vote shall include any fire safety members employed by a Contracting Public Agency as defined in Section 149 of this Article.

(d) Two (2) general members of the Retirement System elected by active general members of the Retirement System to serve a four (4) year term. For purposes of this section, general members eligible to serve and vote shall include any general members employed by a Contracting Public Agency as defined in Section 149 of this Article.

(e) One (1) retired member of the Retirement System elected by the retired members of the Retirement System to serve a four (4) year term, except that the inaugural member elected in 2005 to fill the seat in this category shall serve a two (2) year term. For purposes of this section, retired members eligible to serve and vote shall include any retired members of a Contracting Public Agency as defined in Section 149 of this Article.

(f) One (1) City management employee in the administrative service appointed by the ~~City Manager~~ Mayor to serve at the pleasure of the ~~City Manager~~ Mayor selected from the following: ~~City Manager~~ Chief Operating Officer, City Treasurer, Deputy or Assistant City ~~Manager~~ Chief Operating Officer, or person in a similar position who reports to the ~~City Manager~~ Mayor

The Board of Administration may establish such rules and regulations as it may deem proper; shall elect one of its members president and appoint a secretary and may appoint such other employees as may be necessary. Such appointments, except the actuary, shall be made under the provisions of Article VIII of this Charter.

The Board of Administration shall be the sole authority and judge under such general ordinances as may be adopted by the Council as to the conditions under which persons may be admitted to benefits of any sort under the retirement system; shall have all powers and duties provided in the Declaration of Group Trust for the SDCERS Group Trust effective July 1, 2007 and any amendments thereto or successor trusts hereinafter adopted by Resolution of the City Council; ~~and shall have exclusive control of the administration and investment of such fund or funds as may be established; and shall be permitted to invest in any bonds or securities which are authorized by General Law for savings banks; and, further, shall be permitted to invest in such additional classes or types of investments as deemed prudent by the Board consistent with its fiduciary duties. are approved by resolution of the Council of the City of San Diego; provided, however, that individual investments within the classes or types approved by the Council must be approved by independent investment counsel; and, provided, further, the board may place such funds in the hands of the Funds Commission for investment. Provided, however, that the Auditor and Comptroller shall refuse to allow any warrant drawn for payment of a retirement allowance if, in the opinion of the Auditor and Comptroller, such retirement allowance has been granted in contravention of this Article or any ordinances passed under the authority granted herein.~~

(Amendment voted 03-13-1951; effective 03-26-1951.)

(Amendment voted 11-08-1960; effective 01-09-1961.)

(Amendment voted 11-04-1969; effective 01-29-1970.)

(Amendment voted 06-04-1974; effective 08-13-1974.)

(Amendment voted 11-2-2004; effective 04-01-2005)

(Effective 07-08-2008, the authority, power, and responsibilities conferred upon the Auditor and Comptroller by this Charter were transferred to the Chief Financial Officer. See section 39.)

Prior Language

Section 145: Retirement Fund

All moneys contributed by employees of the City or appropriated by the Council or received from any other source under the terms of this Article, shall be placed in a special fund in the City Treasury to be known as the City Employees' Retirement Fund, which said fund is hereby created. Such fund shall be a Trust Fund to be held and used only for the purpose of carrying out the provisions of this Article. No payments shall be made therefrom except upon

the order of the Board of Administration. This fund may be placed by the Board under the Funds Commission for investment; but shall not be merged with other funds of the City.

| **Sections 146 through 151** [No Change}

ATTACHMENT B

**DECLARATION OF TRUST
SDCERS GROUP TRUST**

Effective: July 1, 2007

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Exhibit A

**DECLARATION OF TRUST
SDCERS GROUP TRUST**

Preamble

Establishment of SDCERS

WHEREAS, in accordance with California Constitution Article XVI, Section 17, City Charter Article IX, Sections 141 – 149 and San Diego Municipal Code §§ 24.0100 – 24.1809, the City of San Diego (the "City") has established and maintains a governmental defined benefit pension plan for its employees, known as the San Diego City Employees' Retirement System ("SDCERS");

WHEREAS, SDCERS is administered by the Board of Administration (the "Board");

Applicable Law

WHEREAS, City Charter Article IX, Section 149 was amended March 5, 2002, to allow public agencies to participate in SDCERS by contract with the Board and now reads as follows:

Subject to approval by the City Council, a public agency may participate in the City Employees Retirement Trust Fund. After a finding by the City Council that the public agency is eligible for participation in the Trust Fund and approval by the City Council of a contract between the Board of Administration and the public agency, as provided by ordinance, the Board may administer the benefits adopted by the public agency for its employees. The public agency shall establish its own benefits and vesting schedule. All monies contributed by the public agency and its employees or appropriated by the public agency or received from any other source under the terms of this Article shall be placed in the Trust Fund to be held and used only for the purpose of paying benefits and necessary expenses of administration related to the public agency's participation. The public agency and its employees shall be responsible for all costs associated with participation in the Fund and the administration of the public agency's benefits. The Board may establish such rules and regulations as it may deem proper, within the terms of applicable Charter sections and ordinances, for the administration of the public agency's contract and benefits.

(Addition voted 03-05-2002; effective 04-24-2002.);

WHEREAS, pursuant to City Charter Article IX, Section 149, San Diego Municipal Code § 24.1801 provides as follows:

§24.1801 Administration by the Retirement Board

The Board may administer a Public Agency's retirement plan under the terms of an agreement between the Public Agency and the Board pursuant to this Division. The Board will invest in the Retirement Fund the assets of any Public Agency retirement plan administered under this Division. A Public Agency employee who participates in a Public Agency's Board-administered retirement

plan is a "Public Agency Participant," whose rights and responsibilities are governed by this Division and by the terms of the Public Agency's agreement with the Board and retirement plan. Public Agency Participants are not employees of the City of San Diego and are not Members of the System as defined in this Article. They are not entitled to vote on ordinances affecting the benefits of City employees under Charter section 143.1. Changes in benefits for Public Agency Participants must be approved according to the rules and procedures governing their respective Public Agency employers, but do not require approval by the City Council.

("Administration by the Retirement Board" added 1-7-2003 by O-19140 N.S.);

WHEREAS, pursuant to City Charter Article IX, Section 149, San Diego Municipal Code § 24.0912 provides as follows:

§24.0912 Board's Authority to Contract with Public Agencies

The Board may contract with any Public Agency to administer the Public Agency's retirement plan, pursuant to Division 18 of this Article, after the City Council makes a finding that the Public Agency is eligible to participate in the Retirement Fund and approves the agreement between the Public Agency and the Board. The Board may adopt the rules that it deems necessary or proper to administer these plans.

("Board's Authority to Contract with Public Agencies" added 1-7-2003 by O-19140 N.S.);

WHEREAS, pursuant to City Charter Article IX, Section 149, San Diego Municipal Code § 24.1806 provides as follows:

§24.1806 Accounting for Public Agency Contributions

The Board will account separately for all contributions it receives from a contracting Public Agency, and no assets of any Public Agency's retirement plan may be used to pay the benefits or costs of administering any other retirement plan administered by the Board. Each Public Agency's retirement plan assets will be commingled with the Retirement Fund's assets solely for investment purposes. The agreement between the Board and the Public Agency will provide for an equitable distribution of earnings among the System and all retirement plans administered by the Board, as determined by the Board in its sole discretion.

("Accounting for Public Agency Contributions" added 1-7-2003 by O-19140 N.S.);

History of Port Participation

WHEREAS, in 1963, the State of California established the Unified Port District of San Diego (the "Port") as a public corporation and the employees of the Port became members of SDCERS through an agreement between the City and the Port;

WHEREAS, on December 10, 2002, the San Diego City Council (the "Council") adopted a resolution finding that the Port was eligible to participate in SDCERS pursuant to City Charter Article IX, Section 149 and approving the Agreement to Administer Retirement Plan between the Port and the Board effective December 20, 2002 (the "Original Port Agreement");

WHEREAS, the Original Port Agreement was superseded by the First Amended Agreement to Administer Retirement Plan between the Port and the Board executed March 30, 2004;

WHEREAS, the First Amended Agreement to Administer Retirement Plan between the Port and the Board was superseded by the Second Amended Agreement to Administer Retirement Plan between the Port and the Board executed August 31, 2005 (the "Final Port Agreement");

History of Airport Authority Participation

WHEREAS, on January 1, 2003, the State of California established the San Diego County Regional Airport Authority (the "Airport Authority") as a separate local governmental entity of regional government, created from a group of employees formerly employed by the Port and from newly hired employees;

WHEREAS, on December 10, 2002, the Council adopted a resolution finding that the Airport Authority was eligible to participate in SDCERS and approving the Agreement to Administer Retirement Plan between the Airport Authority and the Board effective December 20, 2002 (the "Original Airport Authority Agreement");

WHEREAS, on March 29, 2004, the Council adopted a resolution approving the First Amended Agreement to Administer Retirement Plan between the Airport Authority and the Board (the "Final Airport Authority Agreement"), which superseded the Original Airport Authority Agreement;

Establishment of Group Trust

WHEREAS, the language of the City Charter, the San Diego Municipal Code, the Final Port Agreement, the Final Airport Authority Agreement and the related retirement plans was intended to result in the retirement plans of the City, Port and Airport Authority being treated as separate retirement plans with separate trusts, with the assets of those plans commingled only for investment purposes;

WHEREAS, in order to now accomplish the intent of the parties involved, the Board approved the establishment of a group trust for the common investment of the assets of SDCERS and the retirement plans of the Port and the Airport Authority at its meeting on August 26, 2006;

WHEREAS, to participate in the Group Trust, the Board of Commissioners of the Port must approve the participation of the Amended and Restated Unified Port District Retirement Plan and Trust in the Group Trust;

WHEREAS, to participate in the Group Trust, the Airport Authority Board must approve the participation of the Amended and Restated San Diego County Regional Airport Authority Retirement Plan and Trust in the Group Trust;

WHEREAS, the Board approved this Declaration of Trust at its meeting on March 16, 2007;

WHEREAS, simultaneously with the formal establishment of the Group Trust, SDCERS, the City, the Port and the Airport Authority are taking the steps necessary to accomplish the establishment of a separate retirement plan and trust for each of the City, the Port and the Airport Authority, which steps include actuarial studies to separate the assets and liabilities of each retirement plan and trust;

WHEREAS, the Board (or the "Trustee" when acting as trustee under this Declaration of Trust), established the Group Trust known as the SDCERS Group Trust pursuant to this Declaration of Trust, effective as of July 1, 2007;

WHEREAS, the initial allocation of assets pursuant to Section 5.3 of the Group Trust will be implemented as of July 1, 2007;

WHEREAS, the Group Trust is intended to qualify as a group trust under Sections 401(a) (including Section 401(a)(24)) and 501(a) of the Internal Revenue Code of 1986, as amended (the "Code"), and all provisions of this Declaration of Trust must be so construed; and

WHEREAS, SDCERS filed a determination letter request on July 12, 2005, and will revise that request upon the adoption of the Group Trust and completion of all other steps necessary to effectuate the intent of the parties for federal tax purposes.

NOW, THEREFORE, the Trustee declares that it will hold and administer in trust all money and property acceptable to it and received or purchased by it as Trustee under this Declaration of Trust, together with the income and proceeds thereof, upon the following terms, conditions and trusts:

ARTICLE I **DEFINITIONS**

Wherever used in this Declaration of Trust, unless the context clearly indicates otherwise, the following words have the following meanings:

Section 1.1. "*Airport Authority*" means the San Diego County Regional Airport Authority.

Section 1.2. "*Board*" means the Board of Administration of the San Diego City Employees Retirement System ("SDCERS"), which is responsible for the administration of the retirement plans of the City, the Port and the Airport Authority.

Section 1.3. "*Board Rule*" means a rule duly promulgated by the Board.

Section 1.4. "*City*" means the City of San Diego.

Section 1.5. "*Code*" means the Internal Revenue Code of 1986, as amended.

Section 1.6. "*Group Trust*" means the SDCERS Group Trust established by this Declaration of Trust.

Section 1.7. "*Interested Person(s)*" means the Plan Sponsors and any other person entitled to receive a regular periodic accounting of, or inspect the records of, a Participating Trust under federal, state or local law.

Section 1.8. "*Liquidating Account*" means an account established under Section 5.10 for the liquidation of assets.

Section 1.9. "*Net Assets*" means, as of each Valuation Date, the fair market value (as determined under Section 4.2) of all assets owned by the Group Trust, plus Unallocated Assets Receivable, minus Unallocated Liabilities, minus accrued administrative expenses of the Trustee relative to the Group Trust.

Section 1.10. "*Participating Trust*" means a Qualified Trust which, with the consent of the Trustee, has (1) taken formal action to participate in the Group Trust, (2) transferred assets to the Group Trust for investment, and (3) agreed to comply with Revenue Ruling 81-100 and Revenue Ruling 2004-67. Participating Trusts will initially include only those Qualified Trusts listed in Exhibit A hereto.

Section 1.11. "*Participation and Administration Agreement*" means the agreement which must be executed by the Plan Sponsor upon commencement of participation of a Participating Trust in the Group Trust. If applicable, the Participation and Administration Agreement will contain provisions regarding the administration of the Participating Trust by SDCERS.

Section 1.12. "*Plan Sponsor*" means the governmental employer that sponsors a Participating Trust.

Section 1.13. "*Port*" means the San Diego Unified Port District.

Section 1.14. "*Proportional Interest*" means the value of the undivided interest that each Participating Trust has in the Net Assets of the Group Trust as determined under Section 4.4.

Section 1.15. "*Qualified Trust*" means a qualified governmental pension plan under Code Sections 401(a) and 414(d), the assets of which may be invested in a group trust as provided in Code Section 401(a)(24), or an individual retirement account under Code Section 408(q), the assets of which may be invested in a group trust as provided in Revenue Ruling 81-100 (as revised by Revenue Ruling 2004-67).

Section 1.16. "*Trust Expenses*" means amounts paid by the Group Trust for administration of the Group Trust, including, but not limited to, investment management, accounting, custodian, legal counsel and litigation expenses.

Section 1.17. "*Trust Income*" means, as of each Valuation Date, all amounts received from dividends, interest, rents, royalties, net income or losses realized on the sale of Group Trust assets, and any other form of income that the Trustee determines should properly be included.

Section 1.18. "*Trustee*" means the Board of Administration of the San Diego City Employees' Retirement System when it is acting, or is to act, as Trustee under this Declaration of Trust.

Section 1.19. "*Unallocated Assets Receivable*" means settlement proceeds due but not yet received from assets sold by the Group Trust.

Section 1.20. "*Unallocated Liabilities*" means settlement proceeds the Group Trust owes but has not yet paid for assets the Group Trust has purchased.

Section 1.21. "*Valuation Date*" means each date established by the Trustee under Section 4.2.

ARTICLE II. ESTABLISHMENT OF THE GROUP TRUST

Section 2.1. Creation of the Group Trust.

a. The Board has established the Group Trust consisting of contributions made from time to time by the Participating Trusts and all earnings on investments of those contributions, in trust.

b. The Board has prepared this Declaration of Trust to govern the operation of the Group Trust.

c. The Board agrees to serve as trustee of the Group Trust on the terms and conditions set forth in this Declaration of Trust.

d. The Group Trust is named the SDCERS Group Trust. The principal business address of the Group Trust is 401 B Street, Suite 400, MS 840, San Diego, CA 92101.

e. The Group Trust is intended to be a valid trust under California law.

Section 2.2. Purpose of the Group Trust. The purpose of the Group Trust is to hold and jointly invest the assets of the Participating Trusts, and make appropriate payments pursuant to directions from the Participating Trusts.

Section 2.3. Tax Status. The Group Trust is intended to qualify as a group trust under Code Sections 401(a) and 501(a), Revenue Ruling 81-100 and Revenue Ruling 2004-67, and all provisions of this Declaration of Trust must be so construed.

Section 2.4. Exclusive Benefit. Notwithstanding anything to the contrary contained in this Declaration of Trust, or in any amendment hereto, no part of the Group Trust that equitably belongs to a Participating Trust, other than that portion required for reasonable fees, taxes and Trust Expenses (as determined pursuant to Section 7.2 herein) applicable to the Participating Trust, may be used or diverted for any purpose other than the exclusive benefit of the Participating Trust's participants or their beneficiaries who are entitled to benefits under the Participating Trust.

ARTICLE III. **INVESTMENT ADMINISTRATION**

Section 3.1. Responsibility and Authority of Trustee. The Trustee's determination as to whether or not any investment is within the class or classes of property in which the Group Trust may be invested will be conclusive; provided, however, that all such decisions must be made in accordance with the then current investment policy adopted by the Board. The Trustee is solely and exclusively responsible for, and has exclusive authority and discretion for, the management and control of the Group Trust. Subject to the provisions of the preceding sentence, the Trustee may at its reasonable expense retain the services of such investment or other advisers and consultants as it may deem desirable to assist it in carrying out its responsibilities as Trustee under this Declaration of Trust.

Section 3.2. Powers and Duties of Trustee. The Trustee has, with respect to any property at any time held by it as part of the Group Trust, power in its discretion:

a. **Authorized Investments.** To invest and reinvest in any common and preferred stocks; bonds; notes; rights; warrants; debentures; securities; stock options and option contracts of any type; contracts for the immediate or future delivery of financial instruments; certificates of deposit; demand or time deposits (including demand deposits with the Trustee of funds awaiting investment or distribution); bills; certificates; acceptances; repurchase agreements; commercial paper; variable rate or amount notes; interests in trusts and collective and common trust funds; interests in or shares of mutual funds or other investment companies; and foreign unit trusts or other foreign pooled vehicles; provided, however, that the investment choices available to the Trustee are limited by applicable law and the then current investment policy adopted by the Board;

b. **Retention of Property.** To retain any property at any time received by it;

c. **Authority to Sell Property.** To sell or exchange any property at public or private sale for cash or on credit; to grant options for the purchase or exchange of any property; or otherwise to sell, exchange, convey, transfer or dispose of any property;

d. **Participation in Reorganizations, Mergers, etc.** To participate in any plan of reorganization, consolidation, merger, combination, liquidation or other similar plan relating to any property and to consent to, or to oppose, any such plan or any action thereunder, or any contract, lease, mortgage, purchase, sale or other action by any person or corporation;

e. **Participation in Protective Reorganizations.** To the extent permitted by applicable federal and state law, to deposit any property with any protective, reorganization or similar

committee; to delegate discretionary power thereto and to pay or agree to pay part of the reasonable expenses and compensation of any such committee and any assessments levied with respect to any such property so deposited;

f. Exercising Conversion Rights. To exercise all conversion, subscription or other rights, whether or not discretionary, and including rights to vote and grant proxies pertaining to any property held by it;

g. Payment Extensions. To extend the time of payment of any obligation to the Group Trust;

h. Stand-by Agreements. To enter into stand-by agreements for future investment, either with or without a stand-by fee;

i. Cash Balances. To hold part or all of any assets uninvested, without liability for interest; provided, however, that any such assets are held uninvested only so long as reasonably necessary to accomplish reinvestment or to the extent reasonably necessary to satisfy required payments from the Group Trust;

j. Borrowing. To borrow money from any source as may be necessary or advisable to protect the Group Trust in the event of a temporary net cash overdraft or similar event; provided, however, that any such borrowing may be undertaken only in accordance with applicable regulations and examination procedures;

k. Lending of Trust Securities. To lend any securities to brokers, dealers, banks, institutional investors, and to secure the same in any manner and, during the term of any such loan, to permit the securities so lent to be transferred in the name of, and voted by, the borrower or others;

l. Custody of Assets. To register or cause to be registered any investment held by it pursuant to this Declaration of Trust in the name of a nominee, with the addition of words indicating that such securities are held in a fiduciary capacity, or in the name of a nominee of any custodian bank acting pursuant to paragraph (q) of this Section 3.2, or of a depository or clearing corporation, or other system for the central handling of securities, either domestic or foreign; to hold any such investment in bearer form; and to maintain the indicia of ownership of assets outside the United States of America in conformity with regulations of the United States Department of Labor;

m. Collection of Monies Due. To collect and receive any and all money and other property due to the Group Trust and to give full discharge therefor;

n. Litigation. To settle, compromise or submit to arbitration any claims, debts or damages due or owing to or from the Group Trust; to commence or defend suit or legal proceedings whenever, in its judgment, any interests of the Group Trust require it; and to represent the Group Trust in all suits or legal proceedings in any court or before any other body or tribunal;

o. Management of Real Property. To retain, manage, operate, repair, develop, preserve, improve, mortgage or lease for any period, any real property held by the Trustee or by any entity organized by it pursuant to paragraph (p) of this Section 3.2 upon such terms and conditions as the Trustee deems proper, either alone or by joining with others, using other assets for any such purpose as it deems advisable; to modify, extend, renew, waive or otherwise adjust any or all of the provisions of any such mortgage or lease, including the waiver of rentals; and to make such provisions for the amortization of the investment in, or the depreciation of the value of, such property as it may deem advisable;

p. Organizing Corporations, Partnerships and Trusts. To organize corporations, partnerships or trusts for the purpose of acquiring and holding title to any property which the Trustee is authorized to acquire under paragraph (a) of this Section 3.2;

q. Employment of Agents. To employ suitable agents, including custodians, record keepers, auditors, depositories, and counsel, domestic or foreign, and to pay their reasonable expenses and compensation; and to transfer any assets of the Group Trust to any custodian or subcustodian employed by the Trustee;

r. Employment of Investment Advisers. To employ at its reasonable expense the investment advisers and consultants, domestic or foreign, that the Trustee, in its sole discretion, deems advisable; and

s. General Powers. Generally, to do all acts, whether or not expressly authorized, which the Trustee may deem necessary or desirable to carry out the purposes of the foregoing powers or for the protection of the Group Trust.

t. Investment Policy. To adopt an investment policy setting forth the permitted investments for the assets of the Group Trust.

Section 3.3. Limitations of Responsibility. The Trustee's authority, powers, duties, responsibilities and liabilities are subject to the following limitations and other limitations as set forth in federal, California and local law or this Declaration of Trust:

a. The Trustee has no duties with respect to the Group Trust other than those expressly set forth in this Declaration of Trust.

b. The Trustee is responsible only for money and property actually received by the Trustee, and then only to the extent described in this Declaration of Trust or, as applicable, the respective retirement plan and trust of a Participating Trust.

c. The Trustee has no liability for the acts or omissions of any Participating Trust.

ARTICLE IV. **INTERESTS OF PARTICIPATING TRUSTS**

Section 4.1. Trust Accounting. The Group Trust will be invested and administered as a common investment fund. The Proportional Interest of each Participating Trust must be accounted for separately. The details of this accounting method, based on a unitization or

proportional method consistent with custodial bank record-keeping systems, will be established by Board Rule, subject to the prior consultations with and consent of the City, the Port and the Airport Authority, which consent will not be withheld or delayed unreasonably. Consistent with the adopted accounting method, the Trustee will maintain books and records that value the Proportional Interest of each Participating Trust at least monthly.

Section 4.2. Valuation of the Group Trust.

a. The Trustee will designate regular Valuation Dates, on which the Trustee will determine the value of the assets held in the Group Trust. The Trustee may establish these Valuation Dates by Board Rule. Valuation Dates must occur at least monthly. The Trustee may value the assets of the Group Trust on dates other than a Valuation Date, if the Trustee in its sole discretion determines additional valuations are necessary or appropriate.

b. Net Assets must be valued at their fair market values at the close of business on the Valuation Date. However, if fair market values are not readily ascertainable, the Trustee will value the Net Assets in accordance with one of the following methods consistently followed and uniformly applied, in accordance with GASB rules.

(i) Valuation by Independent Pricing Services

The Trustee may value certain securities and other investments based on valuations provided by an independent pricing service if the Trustee reasonably believes the valuations reflect fair market value. A pricing service may determine the value of certain securities and other investments without exclusive reliance on quoted prices and may take into account appropriate factors, such as institutional-size trading in similar groups of securities, yield, quality, coupon rate, maturity, type of issue, trading characteristics and other market data.

(ii) Valuation Where Independent Pricing Service Is Not Used

The Trustee will determine the value of assets for which a pricing service is not utilized as follows:

- (A) The Trustee will value equity securities listed or regularly traded on a securities exchange or automated quotation system at the last quoted sales price on the Valuation Date. The Trustee will value a security that is listed or traded on more than one exchange at the quotation on the exchange determined by the Trustee to be the primary market for such security. The Trustee will value other equity securities and those listed securities that are not traded on a particular day at a price within the limits of the latest bid and asked prices deemed by the Trustee to best reflect fair market value.
- (B) Debt securities are generally traded in the over-the-counter market. The Trustee will state investments in securities with original maturities of one year or more at fair market value as furnished by

dealers who make markets in such securities or by an independent pricing service, which considers yield or price of bonds of comparable quality, coupon maturity, and type, as well as prices quoted by dealers who make markets in such securities. The Trustee will value securities with original maturities of less than one year at their amortized cost in local currency which, when combined with accrued interest, approximates fair market value. The Trustee will value financial futures contracts at closing settlement prices.

- (iii) For purposes of determining the value of the Group Trust's Net Assets, as of the close of business on each Valuation Date, the Trustee will convert into U.S. dollars all assets and liabilities initially expressed in foreign currencies at the mean of the bid and offer prices of those foreign currencies against U.S. dollars quoted by a recognized third-party bank or other financial services entity.
- (iv) Subject to delivery of reasonable advance written notice to the Participating Trusts, the Trustee will have sole authority to determine the fair market value of a particular asset or liability where it reasonably determines that the above valuation procedures are inappropriate or do not reflect fair market value for a particular asset or liability.

Section 4.3. Apportionment of Trust Income. At each Valuation Date, the Trustee will credit Trust Income received by or accrued to the Group Trust since the previous Valuation Date proportionally to each Proportional Interest, as provided by Board Rule. This Board Rule will be subject to prior consultation with and consent of the Plan Sponsors, which consent will not be withheld or delayed unreasonably.

Section 4.4. Valuation of Proportional Interests. The Trustee will establish the initial value of each Proportional Interest in the Group Trust pursuant to Section 5.3. The Trustee will adjust the Proportional Interests at each Valuation Date by cash flow transactions including, but not limited to, the amounts of contributions received from the Participating Trusts (as provided in Section 5.4), benefits paid on behalf of the Participating Trusts (as provided in Section 5.5), allocations of Trust Expenses (as provided in Section 7.2), and amounts credited from Trust Income (as provided in Section 4.3). The value of each Proportional Interest will fluctuate with changing market conditions.

Section 4.5. Records. The Trustee will keep all records it deems necessary or appropriate, in its sole discretion, to record the assets and Trust Income of the Group Trust and to account for the Proportional Interest of each Participating Trust. Interested Persons have the right to examine and audit the records of the Trustee, at mutually agreeable times and locations, in accordance with Article VI. The Trustee will maintain these records in accordance with reasonable and appropriate record retention policies adopted by the Trustee.

ARTICLE V.
ADMISSIONS AND TERMINATION

Section 5.1. Admission to Participation. Participation in the Group Trust is limited to Qualified Trusts whose admission has been approved by the Trustee. The Qualified Trusts listed in Exhibit A will participate in the Group Trust from the inception of the Group Trust, are deemed to have been approved by the Trustee, and are not required to satisfy the application requirements of this section, but are required to comply with all other requirements of this section. Any other Qualified Trust that seeks to participate in the Group Trust must apply to the Trustee for admission by action of the governing body of its Plan Sponsor. If the Trustee approves the participation of the Qualified Trust through appropriate official action, the Qualified Trust will become a Participating Trust as of the Valuation Date immediately preceding completion of all of the following: (i) the Qualified Trust must execute a Participation and Administration Agreement, and (ii) the Qualified Trust must transfer all or any part of its assets to the Trustee for the Group Trust. The Trustee must approve or deny an application for admission within thirty days of receipt. A Qualified Trust may not cancel its application for participation after the Valuation Date on which it becomes a Participating Trust, but must instead follow the withdrawal provisions of Section 5.6. With respect to those Qualified Trusts that have met the requirements to participate in the Group Trust, the Trustee has sole discretion to decide whether to accept non-cash assets into the Group Trust. The Group Trust may accept a non-cash asset on the basis of the value of the asset as of the most recent Valuation Date, as provided in Section 4.2. The Trustee in its sole discretion will value non-cash assets at the close of business on the date of contribution. While assets of any Participating Trust are held in the Group Trust, this Declaration of Trust is part of that Participating Trust's retirement plan or plans.

Section 5.2. Qualified Status of Participating Trusts. Before a Qualified Trust is admitted to participate in the Group Trust under Section 5.1, the trustee or administrator of that Qualified Trust must satisfy the Trustee that the Qualified Trust is a qualified governmental pension plan under Code Sections 401(a) and 414(d) or an individual retirement account under Code Section 408(q) by providing to the Trustee a current Internal Revenue Service tax determination letter, legal opinion or other certification satisfactory and acceptable to the Trustee. However, the Participating Trusts listed on Exhibit A as of July 1, 2007, may participate in the Group Trust while an Internal Revenue Service tax determination letter request is pending. In this situation, the Airport Authority, the Port, and the City must agree to make any changes required by the Internal Revenue Service in order to receive a favorable tax determination letter as a condition to participating in the Group Trust.

Section 5.3. Initial Allocation of Assets. The Trustee will prepare an opening statement of assets based on an allocation and segregation of assets currently in trust as of June 30, 2005, pursuant to City Charter Article IX, Section 149 and San Diego Municipal Code §§ 24.0100 – 24.1809. This allocation and segregation will be done reasonably and in good faith, taking into account the recommendations of the Board's actuary, the history of the existing trust, the funding level of each contributing employer, and any other pertinent information. The initial allocation of assets will be implemented only upon the agreement of the City, the Port and the Airport Authority and will be submitted to the Internal Revenue Service as part of the filings necessary to obtain approval of the Group Trust. The Board's actuary will advise the Board, the City, the Port and the Airport Authority on the appropriate allocation of assets during the interim

period beginning July 1, 2005; and ending June 30, 2007. The Trustee will determine the allocation for this interim period based upon advice from its actuary, and after consultation with the Plan Sponsors. The Trustee will account for the Proportional Interests on this interim basis for as long as the Trustee determines advisable, but no longer than necessary to fully and properly implement the accounting in accordance with this Declaration of Trust based upon the best efforts of the Trustee and the custodial bank. Regardless of the date on which accounting in accordance with this Declaration of Trust takes effect, the Group Trust will be implemented and operational as of July 1, 2007.

Section 5.4. Contributions. The Trustee will accept transfers of assets only from current and potential Participating Trusts and the Plan Sponsors of those Participating Trusts and not from any other person except as permitted by law. However, the Trustee will also accept cash payments, rollovers, or plan to plan transfers for a purchase of service credit by a member of a Participating Trust in accordance with the terms of its plan document. The Trustee may accept assets in its sole discretion only as of the most recent Valuation Date. The Trustee shall determine in its sole discretion the value of any non-cash asset to be transferred on the basis of fair market value on the date of contribution and consistent with the terms of this Declaration of Trust. These transfers may be made by any form of transfer agreed to by the Trustee and the Participating Trust.

Section 5.5. Termination by Participating Trust. A Participating Trust may terminate its participation in the Group Trust at any time by resolution of the Plan Sponsor's governing body. The Participating Trust's Plan Sponsor must give the Trustee no less than one year advance written notice of the termination.

Section 5.6. Termination by Trustee. The Trustee may terminate the Group Trust at any time by resolution of the Board. The Trustee must give the Plan Sponsors of all Participating Trusts no less than one year advance written notice of the termination and must also provide notice to any other Interested Persons.

Section 5.7. Distribution on Termination. In the event of a termination pursuant to Section 5.5, the Trustee will distribute to the terminating Participating Trust its share of the Group Trust in cash, assets or otherwise as determined by the Trustee after consultation with the trustee or administrator of the affected Participating Trust. In the event of a termination pursuant to Section 5.6, the Trustee will distribute to each Participating Trust its share of the Group Trust in cash, assets or otherwise as determined by the Trustee after consultation with the trustee or administrator of the affected Participating Trust or, after consultation with the trustee or administrator of the affected Participating Trust, the Trustee may liquidate the assets for the benefit of the Participating Trusts in the same manner as if the Group Trust were a Liquidating Account (as defined below in Section 5.10). After the termination, the Board will no longer serve as the Trustee of the terminated Participating Trust.

Section 5.8. Distribution on Disqualification. If, at any time, the Trustee reasonably determines or becomes aware that any Participating Trust is no longer a Qualified Trust, and the Participating Trust fails to become a Qualified Trust after a reasonable cure period agreed to by the Trustee taking into account the circumstances, the Trustee will distribute to that Participating Trust its entire participation in the Group Trust (other than any interest it may have

in any Liquidating Account) in cash, assets or otherwise as the Trustee determines in its sole discretion, after consultation with the Plan Sponsor of the affected Participating Trust, as soon as practicable after the next Valuation Date following the expiration of the applicable cure period. After this distribution, the Board will no longer serve as the Trustee of the terminated Participating Trust.

Section 5.9. Valuation of Assets upon Distribution. In all cases, at no time prior to the satisfaction of all liabilities with respect to participants and their beneficiaries under any Participating Trust will that part of the corpus or income of the Group Trust which equitably belongs to that Participating Trust be used for, or diverted to, purposes other than for the exclusive benefit of such participants and their beneficiaries. All distributions from the Group Trust to the successor trustee or administrator of a Participating Trust (in the case of a termination) are deemed to be for the exclusive benefit of participants and their beneficiaries under the Participating Trust.

A special Valuation Date will be established for the distribution under Section 5.7. All assets will be valued pursuant to Article IV.

Section 5.10. Liquidating Accounts. Any asset held by the Group Trust may be transferred to a liquidating account (hereinafter referred to as a "Liquidating Account") when the Trustee reasonably determines that the investment should not continue to be part of the Group Trust. The Trustee may distribute that asset in-kind or liquidate it for the benefit of the Participating Trusts. In determining the basis upon which admissions to and withdrawals from the Group Trust are made pursuant to this Article V, the value of any asset that has been transferred to a Liquidating Account will be excluded. Any investment held in a Liquidating Account will be segregated and administered or realized upon solely for the benefit of those Participating Trusts which were participants in the Group Trust at the time of the transfer of such investment to a Liquidating Account. Each Participating Trust will hold an interest in the Liquidating Account (and any earnings or losses realized on that interest) in the same proportion as that Participating Trust's interest in the Group Trust at time of the creation of the Liquidating Account.

ARTICLE VI. **ACCOUNTING**

Section 6.1. Trustee's Accounts. The Trustee will keep a record of all of its receipts and disbursements. These records will be open to inspection at all reasonable times during the Trustee's business hours by the authorized representative of any Interested Person.

Section 6.2. Judicial Accounting. Except as otherwise provided by law, only the Trustee and any Interested Person may require the judicial settlement of the Trustee's account, or bring any other action against the Trustee with respect to the Group Trust, or its action as Trustee. In any such action or proceeding, the only parties that need be joined are the Trustee and any Interested Person(s). Any final, non-appealable judgment or decree entered in that action will be conclusive.

Section 6.3. Audits and Reports of Group Trust. At least once during each twelve-month period, the Trustee will retain an independent certified public accountant to audit the Group Trust. This accountant will be responsible only to the Trustee. Based upon this audit, after the close of each fiscal year of the Group Trust, and also after the termination of the Group Trust, the Trustee will render a written report, without charge, to each Interested Person. The Trustee will furnish a copy of the report, upon request, to any other person for a reasonable charge. The report will include those financial statements and disclosures required by law, as well as any statements and disclosures the Trustee deems appropriate after consultation with the independent certified public accountant.

ARTICLE VII **TAXES AND EXPENSES**

Section 7.1. Taxes. The Trustee may deduct from and charge against the Group Trust any taxes or other charges imposed upon the Group Trust or the income of the Group Trust, or which the Trustee is required to pay with respect to the interest of any Participating Trust by any present or future laws of any jurisdiction or taxing authority. However, the Group Trust is established as a governmental entity and the Trustee will generally assert that no taxes may be assessed.

Section 7.2. Allocation and Apportionment of Trust Expenses. The Trustee may pay reasonable Trust Expenses from the Group Trust, if these amounts would have been chargeable to the Participating Trusts if incurred in their separate administration. For each year, the Trustee will determine and allocate to each Participating Trust the reasonable and quantifiable Trust Expenses from the previous fiscal year that the Trustee recorded as directly attributable to that Participating Trust. All remaining Trust Expenses will be allocated to the Participating Trusts in the following ways:

a. Investment manager fees, custodian fees and other investment-related fees (including, but not limited to, broker fees, transaction manager fees, and securities lending fees) will be allocated based on the same proportions as the allocation of Net Assets to each Participating Trust (*i.e.*, Proportional Interests) as of the last Valuation Date; and

b. All other remaining expenses will be allocated based on the same proportion as the number of total participants (*i.e.*, active members, individuals receiving benefits, and vested deferred individuals) of a Participating Trust on the first day of the plan year is to the number of total participants of all Participating Trusts on the first day of the plan year.

ARTICLE VIII **MISCELLANEOUS**

Section 8.1. Amendment. The Trustee may amend this Declaration of Trust at any time and in any respect by a resolution of the Board, after consultation with the Plan Sponsors. Notice of any amendment that may affect a Participating Trust must be sent to each Interested Person prior to adoption of the amendment; provided, however, that this Declaration of Trust is adopted subject to the condition that it will be amended, without prior notice to any such persons, to the extent required or deemed necessary by the Trustee in order to qualify as a group trust

under Code Section 401(a) and to be exempt from taxation under Code Section 501(a). If a Participating Trust determines that the amendment is not acceptable, that Participating Trust may withdraw from the Group Trust pursuant to Section 5.5.

Section 8.2. Duty of Trustee. For all purposes under this Declaration of Trust, the Trustee must discharge its duties under this Declaration of Trust with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. The Trustee will not be liable for any loss sustained by the Group Trust by reason of the purchase, retention, sale or exchange of any investment in good faith and in accordance with the provisions of this Declaration of Trust, the laws of the City of San Diego and the State of California, and any applicable federal law.

Section 8.3. Non-Transferability. No Participating Trust may assign or transfer all or any portion of its interest in the Group Trust, except transfers in accordance with Article V of this Declaration of Trust.

Section 8.4. Reliance of Communications. The Trustee is fully protected in acting upon any instrument, certificate or paper it reasonably believes is genuine and signed or presented by a proper person or persons, and the Trustee has no duty to make any investigation or inquiry as to a statement contained in any such writing, but may accept the writing as conclusive evidence of the truth and accuracy of the statements in the writing.

Section 8.5. Governing Law. Except as otherwise provided, this Declaration of Trust is governed by, and must be construed according to, the laws of the City of San Diego and of the State of California. In the event of any conflict between the provisions of this Declaration of Trust and the laws of the City of San Diego or of the State of California, the latter law and regulations will prevail. The Group Trust is organized in the United States and will be maintained at all times as a domestic trust in the United States.

Section 8.6. Availability of Copies of Declaration of Trust. The Trustee will keep a copy of this Declaration of Trust on file at its principal office and it will be available for inspection during regular business hours. A copy of this Declaration of Trust will be sent, upon request, to each Interested Person, and will be furnished to any other person, upon request, for a reasonable charge.

Section 8.7. Titles and Headings. The titles and headings in this Declaration of Trust are for convenience and reference only and will not limit or affect in any manner any provisions contained herein.

The SDCERS Board of Administration has caused this Declaration of Trust to be signed by an appropriate and duly authorized officer on March 16, 2007.

SETTLOR AND TRUSTEE

**SAN DIEGO CITY EMPLOYEES'
RETIREMENT SYSTEM BOARD OF
ADMINISTRATION**

By: 

President of the Board of Administration for
the San Diego City Employees' Retirement
System

EXHIBIT A

PARTICIPATING TRUSTS

San Diego City Employees' Retirement System

San Diego Unified Port District Retirement Plan and Trust

San Diego County Regional Airport Authority Retirement Plan and Trust